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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940.

No. 595

JOHN D. GLASS, *Petitioner*,

vs.

HAROLD L. ICKES, *Respondent*.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, appellant below, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the District of Columbia entered in this cause on August 26, 1940. (R. 28)

OPINIONS BELOW

The Judge of the District Court of the United States for the District of Columbia did not render an opinion. The opinion of the majority of the United States Court of Appeals for the District of Columbia is in the Record at pages 11 to 26. The Separate Opinion of Chief Justice Groner is at pages 26 to 27 of the Record.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered on August 26, 1940. (R. 28)

The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

This case involves two questions. First, whether the allegedly defamatory statements of a press release published by the respondent, while Secretary of the Interior, are absolutely privileged. Second, whether it was proper to sustain a Motion to Dismiss petitioner's Complaint on the grounds the press release was not defamatory of petitioner.

Petitioner will urge that the court below erred in ruling affirmatively on the first question, and in failing to rule negatively on the second.

STATEMENT OF FACTS

The petitioner is a practicing lawyer of Tyler, Texas, and the respondent is the Secretary of the Interior (referred to herein as the Secretary). The petitioner brought suit against the Secretary in the District Court of the United States for the District of Columbia for actual and exemplary damages in the total sum of $750,000 because of an allegedly defamatory written "memorandum to the press," released to the press associations at Washington, D. C. on November 23, 1938, and otherwise published and circulated by the Secretary. Petitioner's Complaint (R. 1-6) quoted the press release (R. 3-5), and alleged that it was false and defamatory and that the Secretary willfully and maliciously released and circulated it knowing that its defamatory statements were false, for the purpose of discrediting and injuring the petitioner and his reputation.

The essential contents of the press release (R. 3-5) may be summarized as follows: It recites that oil operators being invited to contribute to "an oil lobbying fund" sought by the petitioner, were advised by the Secretary "today" to "investigate." Then it states that the petitioner has been barred from practice before the Department and warns oil operators to "stop, look, and listen" before financing his "proposed one-man lobby." Then, after reciting that the petitioner had stated in a letter to oil operators that he was engaged in efforts to reform the Connally Hot Oil Act

and desires and "advocates legislation" and "proposes to enlist Senators and Representatives in his proposals," the release charges: "The record shows "that prior to his resignation on September 13, 1937, the petitioner was employed by the Department; that the Secretary had promulgated a regulation "to prevent former employees from selling confidential knowledge"; that "contrary to such regulation" the petitioner "attempted to represent one Everett Brewer in a proceeding before the Federal Tender Board" and that prior to his resignation, the petitioner had supervised and recommended action "in this very matter"; and that when these facts were called to the attention of the Secretary, he had barred petitioner from practicing before the Board; and that petitioner had brought suits to enjoin that action, but the courts to date had held it was reasonable and proper.

Petitioner's Complaint ("III", R. 2) charged that this press release conveyed and was intended to convey false statements to the effect that petitioner had been barred from practicing before the Department of the Interior for unethically and unlawfully selling or attempting to sell confidential knowledge which he had previously obtained while employed by the Department.

By paragraphs "V" and "VI" of the Complaint (R. 5), petitioner specifically alleged wherein the statements of the press release were false; that he did not represent or attempt to represent Everett Brewer in any matter upon which he had acted while previously

employed by the Government, and did not sell or attempt to sell any confidential knowledge obtained while employed by the Government; and there was nothing in connection with his being barred from practice before the Department that reflected upon his character or reputation, and he had never committed any acts which would justify any warning to the public and oil operators "to investigate" or that he was unworthy of their respect because he was not permitted to practice before the Federal Tender Board.

The Secretary filed a Motion to Dismiss (R. 7) because the Complaint fails to state a claim against him upon which relief can be granted. The District Court rendered judgment (R. 7) sustaining this Motion to Dismiss, and the Court of Appeals affirmed that judgment. (R. 28)

In the District Court and the Court of Appeals, the Secretary's counsel argued that the Complaint states no cause of action for two reasons. First, that the press release is not defamatory; and, second, that it relates to matters committed by law to the control or supervision of the Secretary of Interior, and therefore is absolutely privileged. Petitioner urged: First, the press release was most defamatory of him; and that it is at least so reasonably capable of the defamatory meaning assigned to it in the Complaint that determination of the issue is properly a matter for a jury. Second, that the release was not issued in the performance of an official duty or exercise of an executive func-

tion, within the meaning of the rule of absolute privilege.

The District Court did not render an opinion. Associate Justices Edgerton and Vinson, constituting a majority of the Court of Appeals, rendered an opinion. (R. 11-26) Chief Justice Groner rendered a separate opinion, concurring. (R. 26-27)

In the majority opinion (R.11-26), the Justices quoted from a paragraph of the opinion of the Supreme Court in *Spalding vs. Vilas*, 161 U. S. 483, and stated that the principle laid down in that case is to the effect that a Departmental head is absolutely privileged from liability for defamatory statements made "more or less in connection with general matters committed by law to his control or supervision." And, after reciting their version of the facts of this case, they found that under such doctrine the press release was absolutely privileged. Because of this view, they found it unnecessary to decide the question of whether it was error to dismiss the Complaint on the grounds the communication was not defamatory.

In his separate opinion (R. 26-27), Chief Justice Groner stated that the importance of the principle involved induced him to render it. He criticised the version of the facts in the majority opinion, as being unwarranted from the Record. He found that so far as the Record shows the Secretary's knowledge that petitioner advocated reforms and changes in the Con-

nally Hot Oil Act and invited others to aid in securing these changes was the occasion which provoked the Secretary to issue the press release; and he stated that it is, therefore, "difficult to explain satisfactorily in what respect the Secretary's action was the performance of an official function." The Chief Justice then stated that, on the other hand, the courts had so broadly stated the scope of official authority that he is unable to say that the Secretary's press release was not, in view of his general authority concerning the oil industry, a matter "in relation to matters committed by law to his control" or at least "having more or less connection with the general matters committed by law to his control." And then he concluded as follows:

> "And, in this view, I am compelled to concur in the opinion, though in doing so I express with great deference the fear that in this and previous cases we may have extended the rule beyond the reasons out of which it grew and thus unwittingly created a privilege so extensive as to be almost unlimited and altogether subversive of the fundamental principle that no man in this country is so high that he is above the law." (R. 27)

REASONS FOR GRANTING THE WRIT

The petitioner asserts that a Writ of Certiorari should be granted under sub-division 5(c) of Rule 38 of this Court, in that the United States Court of Appeals for the District of Columbia has decided a question of public interest and general importance, which

has not been, but should be, settled by the Supreme Court, and has misconstrued and failed to give proper effect to a decision of this Court.

BRIEF AND ARGUMENT

POINT I.

The Court of Appeals has decided a question of general importance, which has not been, but should be, settled by the Supreme Court.

The question of absolute privilege of the head of an executive department of the Government, as raised by the facts in this case, has never been decided by the Supreme Court. This appears to be the first case to arise in any Federal court involving a statement defaming the character of a citizen published and released by an executive official to the public generally and the world at large. And it is the first case involving an allegedly defamatory statement published generally by an executive official upon such an occasion and for such purposes as those which provoked the Secretary to issue his press release.

The press release (R. 3-5) is self-explanatory to the effect that its publication was provoked by information that the petitioner was engaged in efforts to secure legislation amendments and reforms, and that the release was issued for the purpose of discrediting or ending those reform efforts by impeaching the character of petitioner. The Secretary's action was mani-

festly and palpably beyond his official authority and executive functions.

In the case of *Spalding vs. Vilas*, 161 U. S. 483, the communication was a circular letter by the Postmaster General to Postmasters, enclosing to them *pursuant to Acts of Congress* warrants for claims due them for adjusted salaries. In *Mellon vs. Brewer*, 18 Fed. (2d) 168, 57 App. D. C. 126, cert. den., 275 U. S. 530, wherein the Supreme Court denied certiorari with a short memorandum referring to the decision of the Court of Appeals, the communication was a report by the Secretary of the Treasury to the President, obviously in performance of an executive function.

It is believed that the language of the learned Chief Justice Groner, in his separate opinion below (R. 26-27), should be sufficient to show the general importance of the question of absolute privilege as it is involved in this case and that the question should be settled by the Supreme Court. However, the petitioner wishes to urge the following considerations:

In this age of radio and the great efficiency of the press, with press conferences, press releases and radio broadcasts of high Governmental officials, words can become great weapons for oppressive abuse of power, unless our courts continue watchful for encroachments.

The heads of the executive Departments of our Government have the respect of the majority of the people and are believed by them. Denials, by an obscure citizen

of any maliciously false and defamatory public charge made against him by one of these officials, serve no purpose. His only hope for protection or relief is the right to seek vindication by a jury.

And if the rule of absolute privilege is to be extended so as to cover all statements of an executive official made "in relation to" or "more or less in connection with general matters committed by law to his control or supervision", the citizen may have no protection from arbitrary, unjust and oppressive defamation of his character by public officials. It is perfectly natural that whenever a Cabinet Officer addresses the public, regardless of the occasion, he will invariably make some comment concerning some matter relating to or having some connection with some of his official duties; at any rate, he can always easily do so. Therefore, for all practical purposes under such an extension of absolute privilege, the rule would be entirely unlimited, and a Departmental head by virtue of his high position could always say whatever he chooses and be above the law.

In America, the citizen has the inalienable right to criticise and seek to reform legislation and the policies and methods of executive action. This right is among our most cherished, and it is vital to the preservation of our institutions of freedom.

But under such an unlimited rule of privilege, if a citizen should exercise his Constitutional right to justly

criticize any policies of a Federal Administration or legislation sponsored by it, any public official having no defense for the policies could destroy the objector and his lawful efforts by vicious false and defamatory press and radio attacks upon the objector's character, and secure absolute immunity merely by making some slight reference to some matter under his official supervision. And the maxim that wherever power is reposed there exists danger of abuse of power, is as true today as in the days of the Great Chief Justice Marshall.

Good citizens cherish their good characters and reputations more than their liberty or even more than their lives. If the rule of privilege accorded executive officials should become unlimited, few would dare to exercise our cherished rights of free speech for the purpose of protesting against any policies of the Government regardless of how destructive those policies may be.

There are two important considerations of public policy involved. One, the protection of the individual citizen from arbitrary, unjust and oppressive action; and the other, the protection of the people by protecting Government officials in the performance of their official duties and executive functions. There exists no serious conflicts between these two considerations, under the law of absolute privilege as actually applied to the facts in the leading judicial precedents. But most serious conflicts arise in any extension of the rule so as to cover the press release in this case.

Petitioner is impressed with the feeling that the final decision of the Courts in this case is a matter of grave public interest, involving a most important civil liberties issue. In some of the previously reported cases the rule of privilege was so broadly stated as to indicate that it is entirely unlimited. While such broad statements of the Courts were not necessary to the decisions in the cases in which they were uttered, it would seem that the Supreme Court should again definitely recognize and state the limits of the rule, or declare it has none.

POINT II.

The Court of Appeals misconstrued and failed to give proper effect to a decision of the Supreme Court.

Petitioner respectfully submits that the court below misconstrued and failed to give proper effect to the decision of the Supreme Court in the case of *Spalding vs. Vilas*, 161 U. S. 483.

The major portion of the final paragraph in the opinion of the Supreme Court in that case reads as follows:

> "We are of the opinion that the same general considerations of public policy and convenience which demand for judges of courts of superior jurisdiction immunity from civil suits for damages arising from acts done by them in the course of the performance of their judicial functions, apply to a large extent to official communications made by heads of executive departments when engaged in the discharge of duties imposed upon them by law.

The interests of the people require that due protection be accorded to them in respect of their official acts. As in the case of a judicial officer, we recognize a distinction between action taken by the head of a department in reference to matters which are manifestly or palpably beyond his authority, and action having more or less connection with the general matters committed by law to his control or supervision. *Whatever difficulty may arise in applying these principles to particular cases, in which the rights of the citizen may have been materially impaired by the inconsiderate or wrongful action of the head of a department, it is clear—and the present case requires nothing more to be determined—that he cannot be held liable to a civil suit for damages on account of official communication made by him pursuant to an act of Congress, and in respect of matters within his authority, by reason of any personal motives that might be alleged to have prompted his action, for personal motives cannot be imputed to duly authorized official conduct.* In exercising the functions of his office, the head of an executive department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may at any time become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the Government, if he were subjected to any such restraints." (Italics supplied)

In their opinion the majority of the Court of Appeals quoted part of the foregoing language of the Supreme Court in the *Vilas* case. (R. 16-17) They left out all

of the important sentence above italicized; and in quoting from the opinion they italicized only the words, "action having more or less connection with the general matters committed by law to his control or supervision."

Reasoning from the language of the *Vilas* decision, as quoted and italicized by them, the majority of the Court of Appeals found that the principle laid down in the Vilas decision is "that a Departmental head is absolutely privileged from liability for defamatory statements made 'more or less in connection with the general matters committed by law to his control or supervision.'" (R. 18) Such interpretation of the *Vilas* decision violates the fundamental rules for proper construction of judicial precedents. It is impossible to so interpret that decision, without ignoring most all the language of the Supreme Court, with the exception of the words which were italicized in the opinion of the court below. If those words are to be so interpreted as laying down the true doctrine of that case, most everything else in the lengthy opinion would appear to be meaningless.

Even if the Supreme Court had intended to say, at that point in its opinion, that defamatory statements of a Departmental head are always absolutely privileged if made more or less in connection with general matters under his control or supervision, such assertion would have been no more than obiter dictum, far beyond the ratio decidendi of the case. This is obvious from the part of the opinion which is italicized in this

brief, but which was significantly avoided by the Court of Appeals.

It is true that in several other cases in which the Court of Appeals has held that Government officials are immune from liability for libelous statements, that court has made comments to the effect that such statements are absolutely privileged if made "in relation to matters committed by law to his control" or at least "having more or less connection with the general matters committed by law to his control." But no such comments were at all necessary for the purpose of the decisions reached in any of the judicial precedents cited by that court; for in all of these cases the communications were in discharge and exercise of an executive function, and the communications, in the first instance at least, were issued in limited official channels and not to the general public or world at large. The instant case is the first reported case to require such a doctrine in order to grant an executive official absolute immunity.

If such were the principle laid down by binding judicial precedents and if it grants the Secretary immunity in this case, then, it simply means that the head of an executive Department of our Government, by virtue of his high position, can say with absolute immunity whatever he chooses, in any manner, anywhere, whenever, for any purpose, and about anyone, so long as he makes some slight reference to some matter in relation to, or having more or less connection with the

general matters committed by law to the control or supervision of his Department. In other words, the Secretary of Interior will always be immune if he merely mentions the Connally Hot Oil Act. And if such is the case, the rule of privilege has become, as feared by Chief Justice Groner, so extensive and unlimited as to be "altogether subversive of the fundamental principle that no man in this country is so high that he is above the law." But, surely, that was not the effect of the decision of the Supreme Court in *Spalding vs. Vilas.*

It may be noted that the majority of the court below indulged in certain assumptions as to the facts in this case, which, if correct, might place the Secretary's press release almost within the true doctrine of *Spalding vs. Vilas.* They assert that petitioner "circularized a large number" of oil operators for assistance. They italicize and emphasize the word "enforcement" so as to show a conclusion that petitioner was engaged merely in efforts relating to enforcement of the Connally Act. Reasoning from such premises, they state it appears not unreasonable for the Secretary to conclude that "it might be desirable to warn prospective client-donors" that petitioner could not then appear in a representative capacity before the agencies charged with enforcement of the Act; and their language is to the effect that that is why the Secretary issued the release, and that it was high time he did so. (R. 25-26)

But these conclusions are entirely unwarranted from facts pleaded in the Complaint; and they are repudiated by recitations in the press release, itself. For unexplainable reasons the majority of the Court below indulged in other assumptions which, while not as material to their ultimate decision, were no less unwarranted than the foregoing. Among these is their assertion, "that the appellant concedes, for the most part, the statements contained in the press release are literally true." (R. 15). And that assertion is palpably erroneous in the face of paragraphs "V" and "VI" of the Complaint. (R. 5-6).

Doubtless the most material of the unwarranted assumptions of the majority are, for the purposes of this Application, adequately disposed of by the reasoning of Chief Justice Groner in the third paragraph of his separate opinion (R. 26-27). But the petitioner desires to specifically point out the following:

The second paragraph of the press release shows that petitioner had written a letter only to one "and several other" oil operators (R. 4); not that he had "circularized a large number."

The word "enforcement" appears only once in the entire Record, in the first sentence of the second paragraph of the release (R. 3); and before and after that sentence the Secretary tells in most certain language just what the petitioner had done and was doing that provoked him to issue the release; namely, invited oil

operators to contribute to an "oil lobbying fund" to finance "a proposed one-man lobby," "desires legislation," "advocates legislation," and proposes "to enlist senators and representatives" in support of his proposals.

Paragraph "VI" of the Complaint (R. 5) shows that the incident of imposition of the practice regulation against petitioner happened in October 1937, more than a year before the date of the press release; and the last two paragraphs of the release (R. 5) purport to show, and do show, just what and all that petitioner was doing in connection with the matter of that regulation, namely, prosecuting litigation against the Secretary challenging the validity of the regulation.

By calling the petitioner's efforts a "one-man" lobby (R. 3), the Secretary revealed that he knew petitioner was not acting or seeking to act in any representative capacity before the Department.

And paragraph "VI" of the Complaint (R. 6) alleges petitioner had never done anything that would justify any warning to oil operators concerning the application of the practice regulation against him.

For the purposes of the issues raised by the Motion to Dismiss, the motion admits the facts as pleaded in the Complaint; and the very style, tone, and language of the release show that the Secretary issued it for the purpose of reporting something so bad about the character of petitioner that no person would henceforth pay any attention to his efforts to procure changes in the

Connally Act. The press release is not to be re-written so as to place it within the rule of absolute privilege. The Secretary may now most ardently wish that he had published it in different language or upon another occasion and for different purposes, or, indeed, not at all. But wishful thinking should play no part here.

It was alone the knowledge that the petitioner was asserting his rights to advocate changes and amendments in the Connally Act which provoked the Secretary to issue the press release. Upon reaching this conclusion, Chief Justice Groner stated that it was therefore difficult to explain in what respect the Secretary's action was the performance of an official function. (R. 27). Petitioner asserts it is not merely difficult; it is impossible.

Nowhere by law or reason has it become the official duty or executive function of the Secretary of the Interior to issue statements to the press in defense of Federal legislation or in opposition to any changes or reform thereof. Granting that he is charged with the function of administering the Connally Act, that does not make it his duty to prevent persons from legitimately petitioning for amendments, repeal, or other reforms in the Act, or to protect Congressmen and oil operators from any lobby for reform. It is not the official duty of the Secretary of the Interior to publicly denounce conscientious objectors to this or any other Act of Congress, for any purpose. The press release contains noth-

ing relative to duties of the Secretary under the Connally Act. It states nothing concerning the merits of any proposed changes in that Act. The subject of the release, a proposed legislation reform, was not a matter which was before the Department for any action. Under our system the powers concerning enactment and amendment of Federal legislation repose in Congress. The issuance of this release was a purely gratuitous action by the Secretary, beyond the scope of his official duties and functions. And, by virtue of the provisions of the Anti-Lobbying Act (July 11, 1919, c6, 41 Stat.; 18 USCA 201), it may be forcefully contended that it is the Secretary's official duty, imposed by law, to refrain from issuing such releases.

In *Spalding v. Vilas* and all the other cases cited by the court below the courts definitely indicated that when a public official steps outside the scope of his official duties he is entitled to no more protection than the ordinary citizen and may be held responsible for his torts. In *Noce v. Morgan*, (8th CCA, 1939) 106 F. (2) 746, the court cited with approval a long list of other cases supporting this proposition.

And in cases of communications in performance of official duty and exercise of executive function, as well as in cases of judicial proceedings, the courts have limited the rule of privilege to statements which are germane to the subject matter of the communication and the occasion of its publication. *Mellon v. Brewer*, 18F. (2) 168, 57 App. D. C. 126, cert. den. 275 U. S. 530;

DeArnaud v. Ainsworth, 24 App. D. C. 167; *Miles v. McGrath*, 4 Fed. Supp. 603; *Harlow v. Carroll*, 6 App. D. C. 128. There exists no relation between the occasion and subject of the Secretary's press release and the matter of any barring of petitioner from practice before the Department. The Secretary defamed the character of petitioner in a matter wholly unrelated and foreign to the occasion which prompted him to issue the release. Therefore, the defamatory statements would not have been privileged even if the release had been an official duty or executive function communication.

CONCLUSION

The Record, with the charges of the Complaint admitted by the Motion to Dismiss, shows: Petitioner criticized a Federal law and proposed that it be amended. The Secretary did not like this; so he maliciously issued to the world a vituperative press release defaming the character of petitioner by false statements wholly irrelevant to the occasion which prompted him to issue it. Then, when the petitioner sought vindication in the courts, the Secretary pleaded the rule of absolute privilege, which exists only for the protection of executive officials in their official duty and executive function communications. The question of privilege as here raised is one of grave general importance which has not been, but should be, settled by the Supreme Court; and the court below based its decision upon an erroneous construction of a decision of the Supreme Court.

Wherefore, Petitioner respectfully prays that a Writ of Certiorari issue in this cause from this Honorable Court to the United States Court of Appeals for the District of Columbia, that upon a review the judgment of that court be vacated and reversed, and that this case be remanded to the courts below with instructions to proceed further in accordance with the views of this Court.

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